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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

IN RE FONTEM US, INC. CONSUMER CLASS ACTION LITIGATION	Case No.: 8:15-cv-01026-JVS-RAO **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CLARIFICATION OR RECONSIDERATION, OR, IN THE ALTERNATIVE, ENTRY OF JUDGMENT PURSUANT TO FRCP 54(b), OR CERTIFICATION FOR INTERLOCUTORY APPEAL** Judge: Hon. James V. Selna Mag. Judge: Hon. Rozella A. Oliver Date: February 13, 2017 Time: 1:30 p.m. Place: Courtroom 10C

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs hereby move for clarification of those portions of the Court's November 1, 2016 Order (Dkt. 95) ("Order") on Defendants' Motion to Dismiss the Second Consolidated Amended Complaint ("SCAC") addressing the temporal parameters of preemption and dismissing Counts I – III and V – VII[1] of the SCAC (the "Dismissed Claims") (Order at 14-15).[2] In the alternative, Plaintiffs move for reconsideration of these portions of the Order pursuant to Rules 54(b), 60(b)(1), (3) and (6), Local Rule 7-18, and/or the Court's inherent power to revise its decisions prior to judgment.[3] In the event that the Court denies all of the foregoing, Plaintiffs respectfully request that the Court enter judgment pursuant to Rule 54(b) as to the claims it has dismissed[4] and as to Plaintiffs Larry Diek, Frank Perez, Paul Pisciotto and Tanya Mullins who brought those claims (the "Dismissed Plaintiffs") so that their dismissal may be immediately appealed. Finally, in the event that the Court does not grant any of the foregoing relief, Plaintiffs respectfully request certification for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), of all parts of the Order concerning preemption. Order at 2-12 and 14-15.[5]

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[1] The Court did not dismiss Count IV, brought by Plaintiff Michael Whitney on behalf of the California Class, seeking injunctive and equitable relief for violations of California's Unfair Competition Law based on violations of Proposition 65.

[2] If the Court grants clarification or reconsideration of these portions of its Order, it will be necessary for the Court also to revisit the substantive arguments that the parties made with respect to Plaintiffs' Illinois state law claims, which the Court did not reach as it found them to be preempted. Order at 15. The validity of the Illinois claims has been fully briefed. Dkt. 74, 80 and 81.

[3] For clarity, Plaintiffs note the portions of the Order they seek to have addressed differ depending on the relief the Court decides to grant, if any. If clarification or reconsideration is granted, Plaintiffs seek it only as to the Order provisions on whether the preemption clause applies retroactively (preempts claims about newly deemed tobacco products based on events prior to the Final Rule's effective date).

[4] Such judgment should also include the claims that this Court, in its April 22, 2016 order on Defendants' motion to dismiss Plaintiffs' Consolidated Amended Complaint (Dkt. 60) dismissed as to affirmative misrepresentations or in full. These claims, the "CAC Dismissed Claims," are described further herein.

I. INTRODUCTION

Plaintiffs respectfully submit that clarification is necessary to address an internal contradiction in the Order concerning preemption by the FDA's Final Rule Deeming Tobacco Products to be Subject to the Federal Food, Drug, and Cosmetic Act as Amended by the Family Smoking Prevention and Tobacco Control Act ("TCA") 81 Fed. Reg. 28974 (May 10, 2016) ("Final Rule"). Although, in the Order, this Court held that preemption under the Final Rule began on August 8, 2016, which the Court deemed to be the effective date for the relevant portion of the rule (Order at 14), it seemingly dismissed the Dismissed Claims in full, even to the extent those claims arise from Defendants' actions ***before*** August 8, 2016. (Order at 14-15.) This is logically inconsistent and thus leads to a confusing and erroneous result. For example, as it now stands, the Order dismisses valid claims for damages arising from conduct occurring in 2010, more than five years prior to the date the Court determined that preemption began. If the Court grants clarification, Plaintiffs respectfully request that it make clear that Plaintiffs' claims are only preempted so far as they relate to Defendants' wrongdoing that occurred after August 8, 2016. Simply put, this Court's holding that preemption began on August 8, 2016 can only logically lead to the conclusion that Plaintiffs' claims, which accrued prior to that date, must be allowed to proceed, but the putative class periods will end on August 7, 2016. Moreover, the

[5] If partial judgment is granted under Rule 54(b), as required by that rule, it will be as to all of each Dismissed Claim and Dismissed Plaintiff. If relief is only granted under 28 U.S.C. § 1292(b), consistent with the requirements of that rule discussed herein, Plaintiffs will seek certification of all preemption issues, not only those related to retroactivity.

Order contains no analysis to support a finding that the TCA preemption clause is retroactive. If these live claims are dismissed, it will divest these Plaintiffs of vested claims that accrued prior to the preemption date.

If such clarification is denied, reconsideration of certain aspects of the Order will be warranted for several reasons. First, this Court misinterpreted the "continuing in effect" language in the Final Rule's preemption clause. The Court's error is understandable because Defendants cited to inapplicable cases on this point and, due to Court-ordered simultaneous supplemental submission by the parties, Plaintiffs were unable to respond. Also, having had only one-sided argument on the meaning of "continue in effect" and whether that implied retroactivity, the Court declined to apply *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court's essential decision on retroactivity, in the preemption context, although *Landgraf* applies to *all* federal statutes, including those with preemption clauses. Moreover, this Court appears to have overlooked Plaintiffs' citation of several cases holding that preemption is applied prospectively, after a preemptive statute's effective date. Dkt. 91, at 13-14. Finally, reconsideration is warranted because the Order as its stands works a manifest injustice on Plaintiffs as it terminates the vast majority of their claims on faulty grounds.

If reconsideration is denied, because these issues are so central to the litigation, they cannot fairly be left in limbo until the end of the case. In such event, a Final Judgment under Rule 54(b) should be entered on the Dismissed Claims and the CAC Dismissed Claims, and as to the Dismissed Plaintiffs who brought only those Claims. The Dismissed Claims, CAC Dismissed Claims and Dismissed Plaintiffs are sufficiently distinct to allow for entry of judgment. In the alternative, the Court's rulings on pre-emption should be certified, pursuant to 28 U.S.C. 1292(b), for interlocutory appeal, as they concern controlling issues of law with respect to the Dismissed Claims on which there is substantial ground for disagreement. This controlling issue of law is a question as to which there is a finite, yes or no answer – whether the Final Rule is preemptive or not – and on which Judges in this District have recently disagreed. If this Court declines to revisit its Order, Plaintiffs respectfully submit that the question should be resolved at this time by the Ninth Circuit.

II. RELEVANT PROCEDURAL HISTORY

The first case in these consolidated actions was filed on April 22, 2015, more than a year before the Final Rule was even published, much less became effective. All of the cases herein were consolidated by December 8, 2015. Dkt. 40. Each Plaintiffs' purchases were made between 2012 and early 2015, and the Plaintiffs were injured by omissions Defendants made at such times. SCAC ¶¶ 18, 20, 22, 24, 26. Thus, ***all events relating to their claims were completed before the Final Rule was issued***. The class periods began, for the California Class, on April 22, 2011, for the New York Class, on October 2, 2012, for the Illinois Class based on fraudulent concealment, on October 2, 2010, and for the Illinois Class based on violation of the ICFA, on October 2, 2012, and the wrongdoing at issue for each class began no later than those dates. *Id.* at ¶¶ 102-104.

On April 22, 2016, this Court issued an order granting in part and denying in part Defendants' motion to dismiss Plaintiffs' Amended Consolidated Complaint. Dkt. 60. Although it dismissed many of Plaintiffs' affirmative misrepresentation claims, the Court found that, as to Plaintiffs' omissions claims based on California and New York law, "Plaintiffs' allegations that Defendants disclosed only the risks of nicotine without disclosing the presence and risk of formaldehyde and the dangers of taking deeper or more breaths of an e-cigarette adequately states a claim for fraudulent partial misrepresentations." *Id.* at 22. Plaintiffs thus had live claims under the California's Consumers Legal Remedies Act ("CLRA"), Unfair Competition Law

("UCL"), False Advertising Law for Deceptive, False, and Misleading Advertising ("FAL"), and New York's General Business Law ("GBL"). *Id.* at 25.

It was not until May 10, 2016, after the California and New York omissions claims had withstood a motion to dismiss and more than five years after the conduct at issue began, that the FDA published the Final Rule which, *inter alia*, made electronic cigarettes subject to the TCA. As to preemption, the TCA provides that "[n]o State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of this subchapter relating to tobacco product . . . labeling." 21 U.S.C. § 387p(a)(2)(A). The Final Rule sets forth dates ***in the future*** when its various provisions would take effect, ranging from three months to two years after its May 10, 2016 publication, meaning some provisions would take effect on August 8, 2016, and others would take effect on May 10, 2018. It did ***not*** provide for e-cigarettes to be subject to the TCA immediately, much less retroactively.

On May 23, 2016, with leave of Court and before any part of the Final Rule became effective, Plaintiffs filed the SCAC,[6] and on July 1, 2016, Defendants filed a second motion to dismiss. On September 15, 2016, with the motion fully briefed, the Court requested supplemental briefing as to the time period to which the preemption clause of the TCA would apply under the Final Rule.[7] The Court also allowed briefing as to *Greene, et al. v. Five Pawns, Inc.*, issued on August 30, 2016 (C.D. Cal., Case No. SA CV 15-1859), in which Judge Carter came to the opposite conclusion as this Court, holding that the Final Rule did not have preemptive effect on similar claims.

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[6] The SCAC added a claim under Illinois law for fraudulent concealment (Count VI), based on the same facts and omissions giving rise to Plaintiffs' other claims.

[7] Plaintiffs' (Dkt. 91) and Defendants' (Dkt. 92) supplemental memoranda are referenced herein as "Plaintiffs' Supp. Mem." and "Def. Supp. Mem.," respectively.

On October 6, 2016, as instructed by the Court, the parties simultaneously submitted supplemental briefing on the commencement date of preemption. In their supplemental brief, Defendants argued ***for the first time*** that the phrase "continue in effect" in the preemption clause somehow voids pending litigation based on conduct that was unlawful at the times it occurred, thereby divesting litigants of vested claims. Defendants, indeed, placed a lot of weight on this argument, italicizing the three words "continue in effect" (Def. Supp. Mem. at 2), and repeating them numerous times. *Id.* at 1-3. As set forth below, Defendants made this argument based on three cases that had nothing to do with applying new law to preempt claims arising from events that occurred before such law's effective date. Indeed, the only case that Defendants cited on this issue that discussed retroactivity used a standard that was explained to be inapplicable to cases like this one by a subsequent Supreme Court decision that Plaintiffs cited for the standard in their own supplemental brief. Because the briefs were submitted simultaneously, Plaintiffs did not have a chance to address Defendants' misguided argument directly.

On November 1, 2016, this Court issued its ruling on Defendants' Motion to Dismiss the SCAC. In that Order, the Court held that "the statutory language demonstrates that preemption regarding e-cigarettes began on August 8, 2016," which means that there could not have been preemption earlier. Order at 14. However, it also seemingly dismissed the Dismissed Claims with prejudice, without distinguishing those parts of such claims that occurred before the effective date of the Final Rule from those that occurred after it.

This has given rise to the present motion because if, as the Court specifically held, "preemption regarding e-cigarettes began on August 8, 2016," *id.*, then it logically follows that Plaintiffs' claims from the beginning of the statute of limitations for each claim up to and including August 7, 2016 are not preempted and may proceed. Plaintiffs thus seek such relief through this motion.

III. ARGUMENT

A. The Order Should Be Clarified to Hold That Because Preemption Began on August 8, 2016, Plaintiffs' Claims Arising Before That Date Are Not Preempted and May Proceed

Clarification should be granted where an order is ambiguous or confusing. *Tessera, Inc. v. UTAC (Taiwan) Corp.*, No. 5:10-cv-04435-EJD, 2016 U.S. Dist. LEXIS 5654, at *9 (N.D. Cal. Jan. 15, 2016). Here, the Order is internally contradictory, which gives rise to confusion and an erroneous result.

First, the Order states that "preemption … began once the rule became effective on August 8, 2016." Order at 14. Given that ruling, claims relating only to conduct occurring ***after*** that date would be preempted. That is, for the end date of each class period for the asserted claims would be August 7, 2016. However, the Court dismissed Counts I-III and V-VII in full, Order at 14-15, even though the class periods for each of Plaintiffs claims begin well before August 8, 2016, and even though those claims are based on conduct that occurred before August 8, 2016. The Court's complete dismissal of the Dismissed Claims appears to contradict its holding as to when preemption began.[8]

Plaintiffs respectfully submit that the Order should be amended to clarify that Claims I-III and V-VII are dismissed only as to conduct that occurs after the effective date – or, alternatively stated, that the proposed class periods for those claims all end on August 7, 2016.

[8] Plaintiffs argued in their Supplemental Memorandum that if the Court found the Final Rule preemptive of state law claims, then Plaintiffs' claims were preserved for the periods before whatever date the Court found preemption began. *See* Plaintiffs' Supp. Mem. at 8-12.

B. Reconsideration Is Warranted as to the Court's Dismissal of Plaintiffs' Claims Prior to August 8, 2016, the Date on Which the Court Ruled Preemption Actually Began

1. The Standards for Reconsideration

If the Court does not grant clarification as described above, Plaintiffs respectfully submit that reconsideration of the Order is warranted. Courts in this District have several bases for revisiting and revising their prior orders, including Rules 54(b), 60(b), Local Rule 7-18, and a court's inherent power to revise its decisions prior to final judgment. *See, e.g., Lions Gate Entm't, Inc. v. TD Ameritrade Holding Corp.*, No. CV 15-05024 DDP (Ex), 2016 U.S. Dist. LEXIS 101234, at **5-10 (C.D. Cal. Aug. 1, 2016) (granting motion for reconsideration made under Rule 60(b) and Local Rule 7-18); *U.S. Rubber Recycling, Inc. v. Encore Int'l, Inc.*, No. CV 09-09516 SJO (OPx), 2011 U.S. Dist. LEXIS 11678, at **7, 11-15 (C.D. Cal. Jan. 7, 2011) (same); *Forest Ambulatory Surgical Assocs., L.P. v. United Healthcare*, No. CV 12-2916 PSG (FFMx), 2014 U.S. Dist. LEXIS 186393, at *3-4 (C.D. Cal. Feb. 12, 2014) (motion made under Rule 54(b) and Local Rule 7-18; granted only under Rule 54(b)). *See also Network Signatures, Inc. v. ABN-AMRO, Inc.*, No. SACV 06-629 JVS (RNBx), 2007 U.S. Dist. LEXIS 48332, at **3,5 (C.D. Cal. Apr. 10, 2007) (Selna, J.) (revisiting order under court's inherent power rather than reconsidering under Local Rule 7-18). Here, reconsideration is appropriate on each of these grounds.

Under Rule 54(b), "…any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and ***may be revised at any time before the entry of a judgment*** adjudicating all the claims and all the parties' rights and liabilities." Rule 54(b) (emphasis supplied). A district "court has broad discretion to reconsider and revise its prior orders." *Trazo v. Nestlé USA, Inc.*, 113 F. Supp. 3d 1047, 1048 (N.D. Cal. 2015) (citing Rule 54(b)). Courts in this District are, among other things, willing to reconsider prior orders where the movant shows that the court has committed a clear error or if the initial order is manifestly unjust. *Meggitt (Orange Cty.), Inc. v. Nie Yongzhong*, No. SACV 13-0239-DOC (DFMx), 2014 U.S. Dist. LEXIS 155473, at *5-9 (C.D. Cal. Nov. 3, 2014). Under "Rule 54(b), a district court has inherent authority to 'reconsider and modify an interlocutory decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of controlling law.'" *Labastida v. McNeil Techs., Inc.*, No. 10cv1690-MMA (CAB), 2011 U.S. Dist. LEXIS 18605, at *3-4 (S.D. Cal. Feb. 25, 2011) (quoting, *Hao-Qi Gong v. City of Alameda*, No. C 03-5495 TEH, 2007 U.S. Dist. LEXIS 33820, at *5 (N.D. Cal. Apr. 23, 2007)); *see Abada v. Charles Schwab, Inc.*, 127 F. Supp. 2d 1101, 1102 (S.D. Cal. 2000) (same). Here, reconsideration is warranted under 54(b) because, as explained above, the Court made a clear error in giving retroactive effect to the Final Rule, particularly after concluding that preemption began on August 8, 2016.

Under Rule 60(b), "a party may seek reconsideration of a final judgment or court order for any reason that justifies relief, including: (1) mistake, inadvertence, surprise, or excusable neglect; … (3) … misrepresentation, or misconduct by an opposing party; or (6) any other reason that justifies relief." *Lions Gate Entm't, Inc.* 2016 U.S. Dist. LEXIS 101234, at *5 (quoting Rule 60(b)). Here, reconsideration is warranted under Rule 60(b)(1), (3) and (6), because, as detailed below, as to Rule 60(b)(1), Defendants surprised Plaintiffs by advocating a proposed contortion of the facially clear phrase "continue in effect," and Plaintiffs did not have a chance to respond; as to Rule 60(b)(3), Defendants gave the court a misimpression of the precedent they cited concerning the phrase "continue in effect"; and as to Rule 60(b)(6), the Court committed clear error in its retroactivity analysis with harsh and inequitable consequences for Plaintiffs.

Under Local Rule 7-18, a motion for reconsideration may be granted where the movant demonstrates "(a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision." Local Rule 7-18. "Whether to grant a motion for reconsideration under Local Rule 7-18 is a matter within a court's discretion." *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, 568 F. Supp. 2d 1152, 1162 (C.D. Cal. 2008). Here, reconsideration is warranted under Local Rule 7-18 because, as demonstrated below, Plaintiffs make a manifest showing that the Court did not consider material information that Plaintiffs presented.

Finally, "this Court has the inherent authority to reexamine its prior decisions prior to the entry of judgment." *Network Signatures*, 2007 U.S. Dist. LEXIS 48332, at *5 (Selna, J.) *See also Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461, 465 (9th Cir. 1989) ("Courts have inherent power to modify their interlocutory orders before entering a final judgment."). "A district court's authority to rescind an interlocutory order over which it has jurisdiction is an inherent power rooted firmly in the common law and is not abridged by the Federal Rules of Civil Procedure." *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 887 (9th Cir. 2001).

Courts in this District readily grant motions for reconsideration where significant facts or precedents were overlooked. For example, reconsideration and revision were granted under Local Rule 7-18 and Rule 60(b) where "the court relied on an outdated statement of law." *Lions Gate Entm't*, 2016 U.S. Dist. LEXIS 101234, at **6-7. Likewise, even where a Central District court does not find it appropriate to reconsider under Local Rule 7-18, it will revisit an order to address rhetorical ambiguity or address an unclear issue. *See, e.g., Forest Ambulatory Surgical Assocs., L.P.*, 2014 U.S. Dist. LEXIS 186393, at *3-4; *Bloch v. Prudential Ins. Co. of Am.*, No.

CV 05-1589- DT (MCx), 2005 U.S. Dist. LEXIS 47534, at *9 (C.D. Cal. Aug. 9, 2005) (court could not grant reconsideration under Local Rule 7-18, but nonetheless revisited decision where basis for dismissal was unclear).

2. The Court Made an Understandable but Clear Error in Its Interpretation of the Phrase "Continue in Effect" Advanced by Defendants for the First Time in Their Supplemental Memorandum

In the Order, in one short footnote, the Court held that the Supreme Court's seminal decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), which sets forth the basic standard for whether ***any*** statute or regulation should be given retroactive effect, did not control here because the Supreme Court "did not discuss preemption." Order at 14, n. 9. The Order offered no explanation as to why the United States Supreme Court's binding precedent on statutory retroactivity – *Landgraf* – does not apply to statutory preemption clauses and therefore should be treated differently than all of the other types of statutes for which the *Landgraf* retroactivity test does govern, but instead quoted the language "continue in effect" from the preemption clause and seemingly gave retroactive effect to the Final Rule. Order at 14.

Reconsideration is warranted here, first, because the Court made a clear error with respect to the meaning of the term "continue in effect," which works a serious injustice on Plaintiffs. Although the Court did not use the term retroactive, its application of the Final Rule to dismiss claims that were based on conduct that occurred prior to the Final Rule's effective date can be ***nothing other than a finding of retroactivity.*** The Order states that "[t]he regulation recites that '[n]o state or political subdivision of a State may establish or *continue in effect* with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of this subchapter with respect to tobacco product … labeling.'" Order at 14 (emphasis in Order). It appears that the Court is adopting

Defendants' interpretation of the "continue in effect" language -- indeed Defendants' Supplemental Memorandum contains identical italics. Def. Supp. Mem. at 2. Defendants, however, gave the Court invalid citations on that point, which Plaintiffs, because of the simultaneous submission of both parties' Supplemental Memoranda, had no opportunity to address. In *Lions Gate Entm't*, 2016 U.S. Dist. LEXIS 101234, at **6-10, a Central District court granted reconsideration where it had relied upon the wrong legal standard with respect to the issues before it. In *U.S. Rubber Recycling, Inc.*, Inc., 2011 U.S. Dist. LEXIS 11678, at **7, 11-15 (C.D. Cal. Jan. 7, 2011), another Central District court did the same. Reconsideration is warranted for similar reasons here.

In their Supplemental Memorandum, Defendants relied on just a few cases for their argument that "continuing in effect" means the TCA preemption resulting from effectiveness of the Final Rule applies to claims concerning activities already concluded rather than governing how a person or entity regulated by the law must conduct themselves once the law becomes effective.[9] The only one of these to address retroactivity, *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711 (1974), did not mention preemption. *Bradley*, moreover, was directly addressed in *Landgraf*, 511 U.S. 244 (cited in Plaintiffs' Supp. Mem. at 9-10), and held by the Supreme Court to be inapplicable to claim-determinative regulations like the preemption clause here. In *Landgraf*, the Supreme Court stated, "[o]ur holding in *Bradley* is … compatible with the line of decisions disfavoring 'retroactive' application of statutes," and clarified that *Bradley* type retroactivity only applies to new laws "collateral to the main cause of action" and "uniquely separable from the cause of action to be proved at trial." *Landgraf*, 511 U.S. at 276-77. In *Bradley*, the statute retroactively applied concerned

[9] Defendants also cite one additional case in that portion of their brief, an 1882 case that simply holds that courts should try to give effect to all language in statutes, and that has nothing to do with preemption or retroactivity. *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882), cited at Def. Supp. Mem. at 3.

attorneys' fees, and the granting or denying of attorneys' fees had no impact on the underlying claims. *Id.* at 278 (citing *Bradley*, 416 U.S. at 721).[10] Here, in stark contrast, applying preemption retroactively eradicates all but one of Plaintiffs' causes of action, and thus is not collateral.

Defendants' other citation on this point -- the only case they cite that actually includes the language "continue in effect," and their only citation in this argument that actually discusses preemption -- is *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 328 (2008). Def. Supp. Mem. at 3. But *Riegel* concerns preemption of a state law claim that arose in 1996 by a federal statute that was enacted well before that, in 1976. 552 U.S. at 316, 320. *Riegel* therefore does not implicate or even mention retroactivity. It simply does not stand for the principle for which Defendants cited it.

Because the parties' supplemental briefs were submitted simultaneously, Plaintiffs could not address Defendants' skewed citations and the Court was left misinformed. Had Plaintiffs had such an opportunity, they could have pointed out that there are, indeed, numerous cases that directly address the words "continue in effect" in statutory preemption provisions and that expressly find that the term cannot be interpreted to preclude pending litigation based on events that have already occurred. Here, given the Court's determination that preemption resulting from the Final Rule began on August 10, 2016, a state may not impose state requirements within the preempted realm to conduct occurring after that date as to do so would be to continue such laws in effect. For example, a claim for injunctive relief seeking to impose a labeling requirement under state law subsequent to August 2016 would be preempted as it would be seeking to continue such labeling requirement in effect. In contrast, a claim for damages arising from a 2012 sale that failed to comply with a

[10] Moreover, as the Supreme Court stated in *Landgraf*, in *Bradley*, there was already a significant risk that attorneys' fees would be granted under the pre-existing law, so "the new fee statute simply 'did not impose an additional or unforeseeable obligation.'" *Landgraf*, 511 U.S. at 278.

state labeling requirement is not continuing such requirement in effect, it is merely applying the law as it existed at the time the claim arose.

For example, in *Gibson v. Dow Chem. Co.*, 842 F. Supp. 938, 939-40 (E.D. Ky. 1992), the court addressed a statute that contained a preemption clause with the "continue in effect" language (the Federal Insecticide Fungicide and Rodenticide Act (FIFRA)), the court explaining that "failure to warn claims are only preempted to the extent they arose after the enactment …in 1972." It held, "[it] is simply incorrect that permitting a failure to warn claim based on events prior to 1972 would violate FIFRA as it presently exists [because] [p]ermitting a damage award for failure to warn prior to 1972 would have absolutely no effect on the manner in which FIFRA operates in 1992," in that "[a] damage award for pre-1972 failure to warn would not change the present labeling process, nor would it require changes in existing labels." *Id.*

In *DiPetrillo v. Dow Chem. Co.*, 729 A.2d 677, 680-81 (R.I. 1999), another court considered the timing of FIFRA preemption based on the "continue in effect" language. It, too, held that where failure to warn claims were based on conduct that occurred before 1972, they were not preempted. *Id.*

Likewise, in *Feinberg v. Colgate-Palmolive Co.*, 2012 NY Slip Op 50515(U), ¶ 3, 34 Misc. 3d 1243(A), 950 N.Y.S.2d 608 (N.Y. Sup. Ct. 2012), it was held with respect to a preemption clause in the Federal Food, Drug, and Cosmetics Act that "bars the states from establishing or 'continu[ing] in effect' any packaging or labeling requirements …" that there was not "any implication from the plain language of the statute that the legislature intended it to be applied retroactively." The court went on to hold that "[n]o matter how strained an interpretation that Colgate would impose on this language, it does not express Congressional intention of retroactivity," *id.*, and found claims not preempted because they derived from conduct preceding the relevant

Act.[11] Here, it was only because the interpretation that Defendants gave to "continue in effect" was so "strained," that they were able to surprise Plaintiffs with it, and Plaintiffs could not have guessed in advance that they should address such a potential interpretation.[12]

Thus, because the Court made a clear error in adopting Defendants' erroneous meaning of "continue in effect" to mean that the statute's preemption is retroactive, reconsideration is warranted as to Plaintiffs' claims arising before August 8, 2018 – the date on which this Court held preemption began.

3. The Court Erred in Not Applying *Landgraf* to Preemption Retroactivity

Reconsideration is also warranted because the Court erred in refusing to apply *Landgraf v. USI Film Products*, 511 U.S. 244 (1994)), the Supreme Court's primary decision on retroactivity. Order at 14, n. 9. In their supplemental briefing, Plaintiffs relied upon *Landgraf* for its enunciation of the strong presumption against retroactivity, and its three part test for whether a statute should be applied retroactively: 1) whether the statute contains an express statement of temporal reach (the Final Rule does not); 2) whether application of the rule to the present case would have a retroactive effect (here it would); and 3) whether there is evidence of clear legislative intent of retroactivity, bearing in mind the presumption against retroactive litigation (here there is not). Plaintiffs' Supp. Mem. at 9-12. Applying the three part *Landgraf* test, Plaintiffs thus demonstrated that to the extent the Final Rule extends the preemptive reach of the TCA at all, any such preemption was not retroactive. *Id.* Notably, this Court agreed that preemption only began on August 8, 2016. Nonetheless, the Court held that *Landgraf* was not controlling because it did not discuss preemption. Order at 14, n. 9. However, *Landgraf* is binding Supreme Court precedent that covers all manner of statutes that litigants assert apply retroactively, and nowhere suggests that it does not apply in the preemption context.

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[11] Although *Feinberg* is an unreported decision, in New York, "unpublished decisions may still be considered as persuasive authority" which is how New York courts view "decisions of other (even superior) trial courts, federal courts, or courts of other jurisdictions." *Yellow Book of NY L.P. v. Dimilia*, 188 Misc. 2d 489, 490, 729 N.Y.S.2d 286, 287 (Dist. Ct. 2001).

[12] Significantly, as detailed below, both *Di Petrillo* and *Feinberg* rely for their preemption analyses on *Landgraf*, which in the Order is discounted as not discussing preemption.

First, even decisions specifically addressing "continue in effect" preemption clauses in failure to warn cases have expressly held that *Landgraf* applies to preemption issues. For example in *DiPetrillo*, 729 A.2d at 680-81, in holding that "continue in effect" language in a 1972 preemption clause did not extinguish claims based on prior conduct, the court relied directly on *Landgraf*:

> … the conduct under challenge occurred between 1968 and 1972, during which years the 1964 enactment of FIFRA was in effect. In *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), the United States Supreme Court enunciated the general principle that ***"'the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place * * *.'"*** *Id*. at 265, 114 S. Ct. at 1497, 128 L. Ed. 2d at 252 (Emphasis added.). ***The Court directed that this principle mandates that subsequently enacted legislation should not be applied retroactively unless there exists clear evidence of congressional intent to achieve that result***. *Id*. at 280, 114 S. Ct. at 1505, 128 L. Ed. 2d at 262.

Id. (emphasis supplied.) Indeed, in *DiPetrillo*, the court stated that the above "result accords with decisions in the related area of tobacco litigation, in which courts almost uniformly have held that the federal statute in effect at the time of the exposure should be applied." *Id.* (citing *Kotler v. American Tobacco Co.*, 685 F. Supp. 15 (D. Mass. 1988), *aff'd*, 981 F.2d 7 (1st Cir. 1992), which held that the preemption provision of the relevant federal cigarette labeling act should not be applied retroactively), and *Cipollone v. Liggett Group, Inc.*, 649 F. Supp. 664, 668 (D.N.J. 1986), *rev'd in part on other grounds*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)).

Similarly, in finding that the language "continue in effect" did not preempt claims based on conduct before the 1997 enactment of a statute, the court in *Feinberg*, 2012 NY Slip Op 50515(U), relied on *Landgraf*:

> It is clear to this court that this statutory language evinces an intention to prohibit the imposition of new requirements by the States that would differ from or conflict with federal requirements, and to bar the continuing application of any conflicting State requirements that may have existed before the Preemption Clause came into effect. ***This language cannot be interpreted to reach back to extinguish any legitimate claims that arose from the use of cosmetic talc products prior to 1997. Such an interpretation would invade existing rights and expectations in derogation of the cardinal rule against retroactivity. See Landgraf, supra*, at 269, 280**.

Id. (emphasis supplied.) *See also Ileto v. Glock, Inc.*, 565 F.3d 1126, 1138 (9th Cir. 2009) (discussing *Landgraf* requirement that for preemption, legislature must manifest the retroactive nature of legislation with "clear intent," as it did in the statute at issue, 15 U.S.C.S. § 7902, which provided "[a] qualified civil liability action that is pending on the date of enactment of this Act … shall be immediately dismissed by the court in which the action was brought or is currently pending.").

Plaintiffs respectfully submit that reconsideration should be granted so that the Court may address the clear error made and facts overlooked with respect to its finding that *Landgraf* did not apply to preemption cases. As demonstrated in Plaintiffs' Supplemental Memorandum at 8-12 and above, *Landgraf* applies to all manner of retroactivity cases, including with respect to statutory preemption, and the Final Rule is not retroactive here. This comports fully with the Court's own conclusion that preemption only began on August 8, 2016. Thus Plaintiffs' Dismissed Claims should be upheld from the beginning of each statute of limitations through August 7, 2016, including the Illinois state law claims.

4. The Court Appears to Have Overlooked Cases Plaintiffs Cited on Non-Retroactivity of Preemption

The Court may have overlooked a number of cases that Plaintiffs cited indicating that preemption is prospective, not retroactive. In holding that the *Landgraf* analysis on retroactivity did not control because *Landgraf* "did not discuss preemption" (Order at 14, n. 9), the Court appears to have reached the mistaken factual conclusion that Plaintiffs did not cite ***any*** cases addressing retroactivity of preemption. It seems possible that because the Court found preemption was effective as of August 8, 2016, rather than May 10, 2018, it may have overlooked the cases Plaintiffs cited at 13-14 of their Supplemental Memorandum, which, although cited under the May 10, 2018 argument heading, all stood for the broader principle at issue. These cases, for example, include *Bullock v. Philip Morris USA, Inc.*, 159 Cal. App. 4th 655, 688 (Cal. Ct. App. 2d Dist. 2008), which Plaintiffs quoted as holding that a new law "preempts claims based on advertising or promotional activities only to the extent that the claims are based on activities that occurred after July 1, 1969 [the effective date]." Plaintiffs' Supp. Mem. at 14. Plaintiffs also cited *Pooshs v. Philip Morris USA, Inc.*, 904 F. Supp. 2d 1009, 1030 (N.D. Cal. 2012), from which they quoted the statement that an "express preemption, which became effective July 1, 1969, preempts state common law actions that would impose such labeling 'requirements or prohibitions' after that date." Plaintiffs' Supp. Mem. at 13-14. The Court in *Pooshs* also held that "to the extent that plaintiff is asserting pre-1969 failure to warn such claims are not preempted and may proceed." 904 F. Supp. 2d at 1030.

Reconsideration is warranted so that the Court may fully consider this precedent if it has not already done so. These cases compel the conclusion that the Final Rule is not retroactive, and thus, consistent with the Court's holding, Plaintiffs' claims should be upheld from the beginning of each statute of limitations through August 7, 2016.

5. Applying the Court's Decision Would Have an Inequitable and Potentially Irredeemable Impact

Reconsideration is also warranted because the Order as it stands would have an unjust, injurious and potentially irredeemable impact. Each of the Dismissed Claims had already accrued at the time the conduct that gave rise to it occurred. *See, e.g.*, *Beaver v. Tarsadia Hotels*, 816 F.3d 1170, 1178, 1188 (9th Cir. 2016) (holding that under common law and UCL, cause of action accrues at the time all elements have been satisfied and that depriving plaintiffs of a right that already existed to bring suit was retroactive and required consideration under *Landgraf*). In dismissing them, the Court deprived Plaintiffs of their right to bring these pre-existing claims that this Court previously upheld, and left only one Plaintiff to go forward with only one claim. Moreover, if the Order is not modified and Plaintiffs are left to appeal their claims at the end of the case after final resolution of the remaining claim and are successful on appeal, they will have to go back and take discovery after significant passage of time during which evidence and witnesses may have become unavailable and memories may have deteriorated. Moreover, because the supplemental briefing was simultaneous, at the Court's instruction, this injury was due to circumstances beyond Plaintiffs' control.

The Order, as it stands, is also likely to have a harmful impact on other litigation. It sets an incorrect precedent regarding preemption that is at risk of becoming ingrained in the law with respect to the new Final Rule which would divest many other litigants of their claims as well. For this reason, too, Plaintiffs respectfully submit that reconsideration of this important issue at this time is warranted.

C. If Clarification and Reconsideration Are Denied, Partial Judgment Should Be Entered Under Rule 54(b)

If the Court does not clarify or reconsider the Order as requested above, the Dismissed Claims, as well as the CAC Dismissed Claims (Claims I, II, III, V, and

VII[13] of the initial Consolidated Amended Complaint),[14] and the Dismissed Plaintiffs will have been dismissed in their entirety. Plaintiffs thus request, as alternative relief, that this Court direct entry of final judgment as to these Plaintiffs and claims, so that Plaintiffs may immediately appeal.

The first sentence of Rule 54(b) provides that, "when an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." The primary issue as to whether there is "a just reason for delay" is whether the immediate judgment will make successive appeals on the same issues likely, or conversely, streamline the litigation. *De La Torre v. CashCall, Inc.*, No. 08-cv-03174-MEJ, 2014 U.S. Dist. LEXIS 176332, at *9 (N.D. Cal. Dec. 22, 2014). The Ninth Circuit "ha[s] held that claims certified for appeal do not need to be separate and independent from the remaining claims, so long as resolving the claims would streamline the ensuing litigation." *Noel v. Hall*, 568 F.3d 743, 747 (9th Cir. 2009) (internal quotation omitted). Here, there is no just cause for delay of judgment on these claims and issues.

The Dismissed Claims, CAC Dismissed Claims and Dismissed Plaintiffs are sufficiently severable that they would not require successive appeals. Presently, the only non-dismissed claim is Count IV, brought by Plaintiff Whitney, on behalf of the California Class seeking injunctive and equitable relief for violations of California's Unfair Competition Law based on violations of Proposition 65. Plaintiff Whitney is the only Plaintiff bringing that claim. Moreover, to the extent that Plaintiffs will appeal from the previously dismissed affirmative misrepresentation portions of the CAC Dismissed Claims, it will have no impact on the remaining claim, as Proposition 65 has nothing to do with affirmative misrepresentations. Moreover, any appellate findings as to preemption will not be in contradiction with any order concerning the remaining claim. Because the Dismissed Claims, CAC Dismissed Claims and Dismissed Plaintiffs constitute the bulk of the claims and parties in this litigation, their immediate appeal would appropriately streamline the resolution of the litigation.

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[13] The CAC Dismissed Claims are based on the same laws (the CLRA, UCL, FAL, ICFA and NY GBL) as those cited in the SCAC, though the CAC also bases those claims on affirmative misrepresentations. This Court's Order on the Motion to Dismiss the CAC (Dkt. 60) indicates that the CAC mis-numbered its last claim as Count VII, and, in that Order, this Court dismissed it as Count VI.

[14] The CAC Dismissed Claims based on the CLRA, UCL, FAL, and NY GBL were dismissed only as to their affirmative misrepresentation theory, the ICFA claim was fully dismissed, and leave was granted to amend, which Plaintiffs did. In its dismissals in the November 1 Order, this Court eliminated the omissions-based portions of these claims that had remained live under the April 22 Order.

D. As an Alternative, Plaintiffs Seek Certification for Interlocutory Appeal pursuant to § 28 U.S.C. 1292(b)

In the event that the Court does not grant any of the foregoing relief, Plaintiffs respectfully request certification for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), of the holdings on preemption set forth in the Order at 2-12 and 14-15, and for a stay of the action in this Court pending a decision on that appeal. 28 U.S.C. § 1292(b) provides:

> [w]hen a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. …

Here, there is a controlling question of law as to which there is substantial ground for difference of opinion. The Final Rule was issued extremely recently and the few cases to have addressed it have reached different conclusions. In *Greene, et al. v. Five Pawns, Inc.*, issued on August 30, 2016 (C.D. Cal., Case No. SA CV 15-1859) ("*Five*

Pawns") (as stated in Plaintiffs' Supp. Mem. at 2-8), another court in the Central District concluded that state-law claims seeking additional warnings on electronic cigarette products were ***not*** preempted by the Final Rule – the exact opposite of this Court's conclusion in the Order. This Court acknowledged the *Five Pawns* holding in the Order, but disagreed with it. Order at 8. There could be no more clear sign of a substantial ground for difference of opinion than the diametrically opposed conclusions of two eminent judges of this District. In subsequent cases, district court judges would be left with the confusing choice of which judge was correct on a black and white issue of law. The Ninth Circuit should be permitted to rule on this issue so that the Dismissed Plaintiffs and future litigants on this important issue will have a definitive answer. Given that preemption ends a litigant's claims entirely, and that there is a single yes or no answer to this question, this presents the quintessential situation for immediate Ninth Circuit intervention.

In addition, resolution of this issue on immediate appeal may materially advance termination of the litigation, because if Plaintiffs were required to wait until the end of the case and then appeal, and Plaintiffs were then successful on appeal, an entirely new trial, as well as new discovery on damages, would be required. If certification for an interlocutory appeal is granted, Plaintiffs respectfully submit that a stay of the action below would be warranted so that if Plaintiffs are successful on that appeal, they would be able to rejoin the case below and all Plaintiffs and claims could proceed together, maximizing judicial efficiency.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully submit that the motion for clarification should be granted, and the Order should be clarified to state that the Dismissed Claims are dismissed only insofar as they concern conduct on and after August 8, 2016. If such relief is not granted, in the alternative, Plaintiffs submit that reconsideration of the relevant portions of the Order is warranted, and Plaintiffs claims should be reinstated except to the extent that they concern conduct on and after August 8, 2016. If neither of the foregoing is granted, for the reasons set forth above, judgment should be entered under Rule 54(b) as to the Dismissed Claims, the CAC Dismissed Claims and the Dismissed Plaintiffs. Finally, if the Court does not grant any of the foregoing, all those portions of the Order concerning preemption should be certified for immediate appeal pursuant to § 28 U.S.C. 1292(b).

Dated: November 21, 2016

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